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& Safe Families Act in Michigan

An Overview

One of the major challenges facing state courts in child protective proceedings is understanding and complying with the requirements of federal law, especially the Adoption and Safe Families Act (ASFA) and related regulations. A federal review by HHS found room for improvement in Michigan's compliance with various objectives regarding child and family issues. While some problems identified in the review are not under the judicial branch's control, other problems are.

This article discusses ASFA requirements that apply to courts, comparable Michigan statutory provisions, and the report of an expert work group convened to respond to the federal review as it involves the courts. The work group's recommendation for court rule improvements are before the Supreme Court, following the release of the proposed rules for notice and comment.

Adoption and Safe Families Act (ASFA)

This 1997 statute (PL 105-89), amending the 1980 Adoption Assistance and Child Welfare Act, imposes many requirements on states for processing their abuse and neglect cases. ASFA conditions federal funding, both for the administrative costs of the system and for foster care and adoption subsidies, on compliance with the federal requirements. While a few provisions involve time limits, many more requirements describe the kind of system that the state must set up. Most requirements affect the agency that runs the system—in Michigan, the Family Independence Agency (FIA)—rather than the courts. Nonetheless, some of AFSA's provisions do affect how courts handle abuse and neglect cases.

Substantive requirements

ASFA requires a substantial showing before a court or agency may remove a child from the parents' home. Once a court or agency takes jurisdiction, the statute and regulations require states to proceed expeditiously. The two key factors in the initial stage of acquiring jurisdiction are the "contrary to the welfare of the child" test and the "reasonable efforts" standard.

42 USC 672(a)(1) provides that a child may not be removed from the home unless the court determines that staying in the home is contrary to the child's welfare. The statute also provides that reasonable efforts must be made to preserve and reunify families before placing the child in foster care. Those reasonable efforts can be excused because of aggravating circumstances, generally that the parents have committed a crime involving the child.[1] The "contrary to the welfare of the child" determination must appear in the first court order authorizing the child's removal.[2] The court must also determine that reasonable efforts to prevent removal have been made (or were not required) within 60 days after the child's removal.[3]

In Michigan, the Juvenile Rules package that took effect May 1, 2003, is aimed at complying with federal requirements. New MCR 3.903(3) defines "contrary to the welfare of the child." MCRs 3.963(B)(1)–(2), 3.965(C)(2)–(3), and 3.980(B) require a "contrary to the welfare of the child" finding as a basis for the court order taking custody of a child. Rules 3.965(D), 3.973(F)(3), and 3.980(B) incorporate the reasonable efforts requirement.

Case processing requirements

Federal law also imposes a number of requirements for permanency plans, case reviews, and initiation of termination of parental rights (TPR) proceedings.

In general, a "case plan" must be developed within 60 days after the child is removed from the home (45 CFR 1356.21(g)(2)). A status review must take place at least every six months.[4] Permanency planning hearings must be held within 12 months after the child enters foster care and at least every 12 months thereafter.[5] When a court has determined that reasonable efforts are not required to reunify the family (i.e., because of aggravated conduct), a permanency planning hearing must be held within 30 days.[6]

Generally, when a child has been in foster care for 15 of the last 22 months, the state must initiate termination of parental rights proceedings.[7] But three exceptions excuse initiation of termination proceedings: (1) at the state's option, the child is being cared for by a relative; or (2) the state agency's case plan documents a compelling reason why a termination petition would not be in the child's best interests; or (3) the state has not provided the services deemed necessary within the time period set out in the case plan. Where a court has ruled that reasonable efforts to avoid removal are not required (i.e., aggravated abuse situations), termination proceedings must begin within 60 days of that determination.[8]

Michigan statutes and court rules adopt most of these provisions. MCL 712A.18f provides that a case service plan must be provided to the court and the parties before the court enters an order of disposition in an abuse and neglect case. The plan must be updated at 90-day intervals. The Michigan statute also requires more frequent status reviews than mandated by federal law: every 91 days[9] or every 182 days where a placement is considered permanent.[10] MCL 721A.19a(1) requires a permanency planning hearing within one year after the initial petition is filed, in contrast to the federal law, which measures the time from placement in foster care. New MCR 3.975(C) incorporates those provisions. A related provision is found in MCL 722.954b, which directs the supervising agency—not the court—to strive for a permanent placement within 12 months after the child's removal from the home.

Unlike ASFA, the Michigan statutes do not provide for a shorter time limit for holding a permanency planning hearing where the court or agency determines that reasonable efforts to avoid removal are not required. MCR 3.976(B)(1) does, however, require the initial permanency planning hearing within 28 days of the determination.

Under MCL 712A.19a(7), if the court determines at a permanency planning hearing that the child should not be returned to the parent, the court must order the agency to initiate termination proceedings 42 days after the permanency planning hearing (unless the court finds that termination is clearly not in the child's best interests). MCR 3.976(E)(2) repeats that provision. If that determination is made at the first permanency planning hearing, which must be within 12 months of the filing of the initial petition, the federal 15-month requirement would be met. Both the federal and the Michigan procedures contemplate that permanency planning hearings may take place periodically, which could go well beyond the 15-month limit for initiating TPR proceedings. However, if one of the three federal exceptions listed above applies, the federal requirement would not be violated.

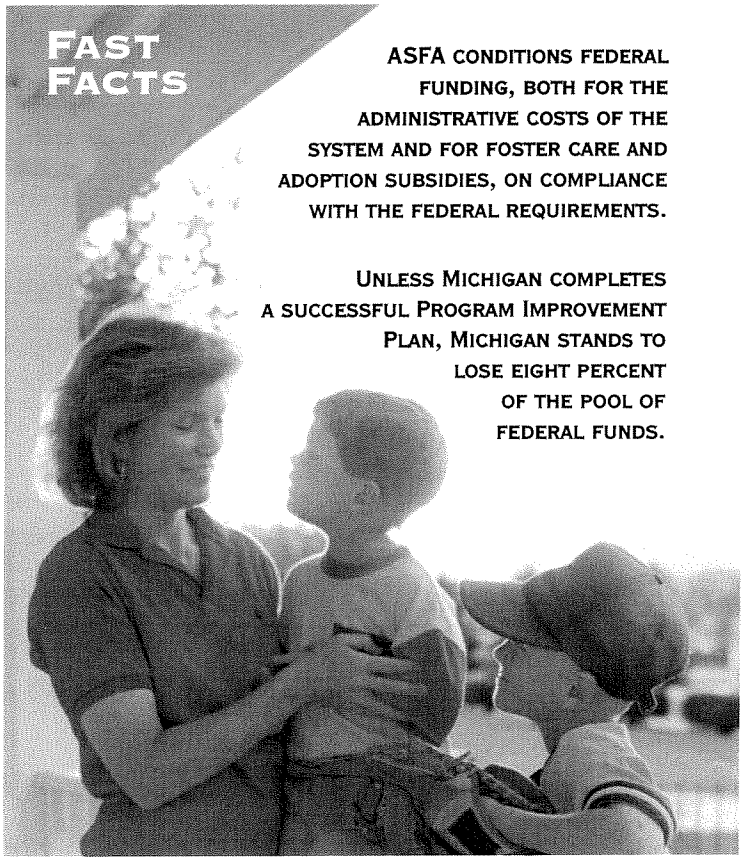
The Michigan statute does not explicitly require the filing of a termination petition within 60 days of a determination that reasonable efforts to avoid removal are not necessary. However, the 28-day hearing required under MCR 3.976(B)(1), coupled with the 42-day provision of MCL 712A.19a(7), would result in the termination petition being filed in 70 days.

Other than termination proceedings, the federal statutes do not specify when steps must be taken toward adoption. Moreover, federal law does not require hearings after parental rights are terminated. By contrast, Michigan law requires review hearings at least every 91 days after the termination of parental rights.[11] If foster care or relative placement is intended to be permanent, case review hearings are to be held every 182 days.[12] Also, MCL 722.954b(2) provides that, if an adoptive family is not identified within 90 days after termination of parental rights, the child is to be included in the adoption registry established by MCL 722.958 as a clearinghouse for information about adoptive families and available children.

Federal Child and Family Services Review

The recent federal focus on these issues chiefly concerns Michigan's failure to meet federal requirements, which may lead to the reduction in Michigan's share of federal funds. Each state must have a plan for foster care and adoption assistance approved by the Secretary of Health and Human Services. 42 USC 671 lists numerous elements that must be included in that plan.

Under the federal regulations, the federal assessment rates the state system on two groups of factors, seven "outcomes," and seven



"systemic factors." The outcomes, listed in 45 CFR 1355.34(b)1), include:

- Children are protected from abuse and neglect.
- Children are safely maintained in their own homes whenever possible and appropriate.
- Children have permanency and stability in their living situations.
- The continuity of family relationships is preserved.
- Families have enhanced capacity to provide for their children's needs.
- Children receive appropriate services to meet their educational needs.
- Children receive adequate services to meet their physical and mental health needs.

THE MICHIGAN STATUTES DO NOT PROVIDE FOR A SHORTER TIME LIMIT FOR HOLDING A PERMANENCY PLANNING HEARING WHERE THE COURT OR AGENCY DETERMINES THAT REASONABLE EFFORTS TO AVOID REMOVAL ARE NOT REQUIRED.

The systemic factors specified in 45 CFR 1355.34(c) are:

- statewide information system
- case review system
- quality assurance system
- staff training
- service array
- agency responsiveness to the community
- foster and adoptive parent licensing, recruitment, and retention

The review describes a number of items within each outcome and factor. Each of those items is rated as a strength or an area needing improvement.

The Final Report of the Michigan Child and Family Services Review concluded that Michigan does not satisfy any of the seven outcome categories. It does comply with all but one of the systemic factors. Thus, barring any challenges to the conclusions of the review, unless Michigan completes a successful Program Improvement Plan, Michigan stands to lose eight percent of the pool of federal funds. FIA submitted Michigan's improvement plan to the federal agency on March 19, 2003. Once federal authorities approve the plan, the federal agency will establish a time for implementation, which will very likely be two years.[13]

Many of the items cited in the federal review are beyond the courts' control. However, the one systemic factor on which Michigan failed the review, the Case Review System, is an area in which the courts play a significant role. Within that factor, three items were identified as needing improvement and two as strengths. Michigan's strengths included 1) meeting the federal requirement of periodic review at least once every six months; and 2) providing a process for termination of parental rights proceedings in accordance with ASFA.

"Areas needing improvement" included ensuring that each child has an appropriate written case plan developed jointly with the child's parents. The review concluded that, despite Michigan's policy requiring preparation of such plans, the plans were not being developed in many cases. Further, case plans were not being consistently developed jointly with the children and parents. Often plans were not signed by the parents. Fathers, particularly, were not engaged in treatment planning. Case plans are often generic and do not address individualized family needs.

Our state was also cited for not consistently holding permanency planning hearings at least once every 12 months. The review found that the requirement was met in only 59 percent of the cases. It found that the "consistency with which the reviews are completed is variable." The review added that the focus of the hearings is not always on advancing permanency.

The review also said the Michigan system did not consistently notify foster parents, preadoptive parents, and relative caregivers of hearings and give them an opportunity to be heard. The review summary explained that the statute requires such notices, but said "the findings of the review indicate an inconsistent notification of foster parents, preadoptive parents, and relative caregivers due in part to a lack of clarity regarding the responsibilities and process for notifying these parties."

Work Group Recommendations

In April 2003, a work group convened to study ways to improve the adoption process in Michigan. Part of the group's charge was to examine the criticisms of the federal review and suggest ways to address those issues. The group, which also included FIA officials and attorneys, was chaired by Karen Tighe, Chief Judge of the Bay County Probate Court, and retired Probate Judge Donna Morris of Midland.

In September 2003, the work group issued its final report. Its recommendations include amending state court rules to:

- Encourage filing of petitions for termination of parental rights in less than 42 days.
- Encourage earlier scheduling of permanency planning hearings.
- Give termination of parental rights cases "the highest possible priority" for scheduling, so that cases are not delayed.
- Identify early in the proceedings absent parents, relatives who may be potential caregivers, and other interested parties.
- Ensure participation of interested persons, including parents, potential adoptive parents, relatives, and others, at hearings.
- Control substitution of attorneys for children.
- Require courts to verify whether lawyer-guardians ad litem meet with the children they represent, so they can provide courts with an accurate assessment of the children's best interests.

The work group also urged trial courts to comply with reporting guidelines that will permit the State Court Administrative Office (SCAO) "to publish an annual report regarding each court's compliance with the provisions designed to achieve permanency, including data on compliance with time requirements."

In October 2003, the Supreme Court published the work group's proposed court rule changes, including:

- Revise MCR 3.965(B) to require the court to ask parents, guardians, or legal custodians to identify relatives with whom the child could be placed.
- Revise MCR 3.965(E) to provide that courts "shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests."
- Amend MCR 3.977 to require courts to give child welfare cases "the highest possible priority" in scheduling.
- Amend MCR 3.975 and 3.976 to clarify time limits for filing permanent custody petitions. Courts would also be required to notify interested parties of dispositional review and permanency planning hearings. The notice of a permanency planning hearing "must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties."

Also included among the proposals are amendments to MCR 3.915 to enforce the statutory requirement that lawyer-guardians ad litem for children meet with their clients before each hearing.

The Court welcomes the input of the bench, bar, and the public on this critical issue to our children. ✦

Maura D. Corrigan was elected to the Michigan Supreme Court in 1998 for an eight-year term. She is currently serving her second term as chief justice, having been elected by her colleagues in 2001 and in 2003. In practice, she was an assistant prosecuting attorney in Wayne County, Michigan from 1974 to 1979; in 1979, she became chief of appeals in the United States Attorney's Office in Detroit; in 1986, she became the first woman to be Chief Assistant United States Attorney in Detroit; and in 1989, she entered private practice as a partner in the firm of Plunkett & Cooney. She was appointed to the Michigan Court of Appeals in 1992 and became its chief judge in 1997. Corrigan graduated magna cum laude from Marygrove College in Detroit in 1969 and cum laude from the University of Detroit Law School in 1973.

Footnotes

1. 42 USC 671(a)(14)(D).
2. 45 CFR 1356.21(c).
3. 45 CFR 1256(b)(1)(i).
4. 42 USC 675(5)(B); 45 CFR 1355.34(c)(2)(ii).
5. 42 USC 675(5)(C); 45 CFR 1355.34(c)(2)(ii).
6. 42 USC 671(a)(15)(E)(i).
7. 42 USC 675(5)(E); 45 CFR 1256.21(h)(4)(i).
8. 45 CFR 1256.21(h)(4)(ii).
9. MCL 712A.19(3).
10. MCL 712A.19(4).
11. MCL 712A.19(3); MCR 3.978.
12. MCL 712A.19(4).
13. 45 CFR 1355.34(d).